

Rescue Package for Fundamental Rights: Comments by DANIEL HALBERSTAM

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I welcome the [Heidelberg proposal](#)! Several years ago – long before the [Zambrano](#) judgment confirmed the idea – I wrote a [piece](#) explaining that a “reverse Solange” idea could already be discerned from such early cases as [Carpenter](#) and [Chen](#). Despite the doctrinal niceties that provided certain formal limits to those early cases, it was clear that the European Court of Justice had virtually plenary jurisdiction over fundamental rights throughout the European Union. With the adoption of the binding Charter of Fundamental Rights, that is even more evident today.

Since U.S. analogies have been bandied about, let me throw in a few others.

First, just as U.S. plaintiffs have to buy a plane ticket to establish standing to complain of environmental damage along the Nile after [Lujan v. Defenders of Wildlife](#) (references perhaps only obvious to Americans), so, too, Mr. Kremzow, for example, could have gotten his fundamental rights review from the ECJ. Recall that the ECJ rejected Mr. Kremzow’s plea from jail to review his Austrian murder conviction. The Court said it was an entirely internal situation. Well, if Mr. Kremzow had just bought himself a train ticket and alleged that he was being prevented from exercising his free movement rights to buy a baguette in Paris, he could have gotten his review from the ECJ. He would have been rather in the same situation as Mrs. Carpenter whose presence in the U.K. was reviewable simply because it enabled her husband to engage in cross border activities in the EU.

And all that was without citizenship and the fundamental rights charter, which have only made these and similar arguments stronger. If the ECJ (and now the CJEU) has held back over the years from full “incorporation” of the bill of rights against states – to bring in a second US analogy – then this restraint was not a function of doctrinal necessities. Instead, it has been the CJEU’s Solange-type restraint in the face of the reasonable, wholesale protection of such rights in the Member States. That’s reverse Solange. And Member States can forfeit this restraint. After all, in a Member State that systematically neglects fundamental rights protection, all rights of EU citizenship are necessarily in peril just as young Zambrano’s were.

I am surprised to hear my [American colleague](#) bring in New Deal cases to argue for illegality here. Schechter Poultry is part of a non-delegation doctrine that has not survived well in the United States. Yes, remnants persist here and there of the doctrine. But it has not proven a full-fledged workable doctrine of containment.

Maybe that’s because here, too, we have seen “constitutional” (as opposed to “administrative”) shifts in the United States horizontally to U.S. agencies, as I have suggested [elsewhere](#).

The final U.S. analogy, though, highlights the constitutional realm that Peter Lindseth's administrative supranationalism seeks to avoid: European constitutionalism as emancipation from delegation. If we think back to the U.S. Amendments that guarantee citizenship, equality, and fundamental rights against component state infringement in the United States, we notice (with Bruce Ackerman) that these Amendments did not come about in a regular manner. Southern states were coerced into their adoption. This is why the reconstruction amendments are often seen as a second Founding. They have the whiff of illegality about them – just as the original Founding did. Constitutional moves – big and small – usually do. Legality and legitimacy run together as we stretch or recalibrate the former in the service of the latter.

Constitutional pluralism recognizes this emancipation of the European realm of governance. But it insists that in the process of emancipation, Europe not become its own *raison d'être*. Reverse Solange should, on this reading, inspire hope not fear. What we have to fear, instead, is the lack of this spirit of compromise that has, at times, seemed to grip the [European court](#). As for “reverse Solange,” it's been around for a good long while, and I'm all for it.

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